Supreme Court, U.S.
FILED
APR 2 - 2015
OFFICE OF THE CLERK

No. 14-556, 14-562, 14-571, & 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, et al.,
Petitioners,

v.

RICHARD HODGES, Director, Ohio Department of Health, et al.,
Respondents.

(caption continued on inside cover)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE COMMITTEE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Curt Levey
THE COMMITTEE FOR JUSTICE
722 12th Street, NW
Fourth Floor
Washington, DC 20005
202-270-7748
CLevey@committeeforjustice.org

Meir Katz
Counsel of Record
THE BERKMAN LAW OFFICE
111 Livingston Street
Suite 1928
Brooklyn, NY 11201
718-855-3627
MKatz@berkmanlaw.com

Counsel for Amicus Curiae

(caption continued from cover)

VALERIA TANCO, et al.,
Petitioners,

v.

BILL HASLAM, Governor of Tennessee, et al.,
Respondents.

APRIL DEBOER, et al.,
Petitioners,

v.

RICK SNYDER, Governor of Michigan, et al.,
Respondents.

GREGORY BOURKE, et al.,
Petitioners,

v.

STEVE BESHEAR, Governor of Kentucky, et al.,
Respondents.

QUESTIONS PRESENTED

The questions presented are: Does the Fourteenth Amendment require a State to 1) license a "marriage," or 2) recognize a "marriage" licensed in another jurisdiction, when that "marriage" is between two people of the same sex?

Predicate and essential to those questions is a third question: 3) What is a "marriage"?

TABLE OF CONTENTS

QUESTION PRESENTED ..... *i*

TABLE OF AUTHORITIES ..... *iv*

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Court must determine what constitutes "marriage" before considering whether a right to marry has been violated 4

II. There are two competing complete, neutral, and robust theories of marriage 9

A. The "historical norm": The word marriage always described a union between a man and a woman 9

B. The "consent norm": Marriage is the result of adults consenting to form a committed familial relationship 23

C. The historical and consent norms comprise the Court's exclusive options 25

III. The consent norm poses considerable legal and line-drawing problems 26

A. *Reynolds*, which upholds state bans of bigamy, is inconsistent with the consent norm 28

B. State statutes that prohibit and criminalize incestuous and plural marriages are inconsistent with the consent norm 29

C. Mandating that States license or recognize same-sex marriages, but not requiring them to license or recognize plural or incestuous marriages, is unprincipled and inconsistent with the Fourteenth Amendment 31

IV. This Court should decline to choose one theory of marriage over the other 32

A. Choosing between the historical and consent norms is necessarily political or philosophical and is not well-suited for resolution through litigation 32

B. *Windsor* held that federal law may not displace state definitions of marriage 36

CONCLUSION 37

APPENDIX

A Partial List of Statutes of States in the Sixth Circuit that Prohibit or Criminalize Plural and Incestuous Marriages 1a

TABLE OF AUTHORITIES

Cases **Page**

Armstrong v. Exceptional Child Center, Inc.,
2015 WL 1419423 (Mar. 31, 2015) 15-16

Baker v. Nelson:

409 U.S. 810 (1972) 35

291 Minn. 310, 191 N.W.2d 185 (1971) 10, 18

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 26

Brown v. Buhman,

947 F.Supp.2d 1170 (D. Utah 2013) 28-29

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 21, 28

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 31

Conaway v. Deane,
401 Md. 219, 932 A.2d 571 (Md. 2007) 18

District of Columbia v. Heller,
554 U.S. 570 (2008) 17

Ex parte State ex rel. Alabama Policy Inst.,
2015 WL 892752 (Ala. Mar. 3, 2015) 18

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010)..... 16

Giles v. California,
554 U.S. 353 (2008) 28

Holder v. Hall,
512 U.S. 874 (1994) 5, 33

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S.Ct. 694 (2012) 16

Jackman v. Rosenbaum Co.,
260 U.S. 22 (1922) 17-18

Jones v. Hallahan,
501 S.W.2d 588 (Ky. Ct. App. 1973) 18

Kansas City S. Ry. Co. v. McNamara,
817 F.2d 368 (5th Cir. 1987) 34

Larson v. Valente,
456 U.S. 228 (1982) 21-22

Lawrence v. Texas,
539 U.S. 558 (2003) 9

Loving v. Virginia,
388 U.S. 1 (1967) 8

Matter of Cooper,
187 A.D.2d 128, 592 N.Y.S.2d 797
(N.Y. App. Div. 1993)..... 18

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 15-16

N.L.R.B. v. Noel Canning,
134 S.Ct. 2550 (2014) 16-17

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S.Ct. 2566, (2012) 16

Nevada Comm'n on Ethics v. Carrigan,
131 S.Ct. 2343 (2011) 16-17

Reynolds v. United States,
98 U.S. (8 Otto.) 145 (1878)..... 3, 8, 28-29, 32

Sch. Dist. of Abington Twp., Pa. v. Schempp,
374 U.S. 203 (1963) 20-21

Singer v. Hara,
11 Wash. App. 247, 522 P.2d 1187 (1974) 18

Town of Greece, N.Y. v. Galloway,
134 S.Ct. 1811 (2014) 16

United States v. Comstock,
560 U.S. 126 (2010) 16

United States v. Windsor,
133 S.Ct. 2675 (2013) 3, 9-10, 17, 32-33, 36

Walz v. Tax Comm'n of City of New York,
397 U.S. 664 (1970) 17

Zorach v. Clauson,
343 U.S. 306 (1952) 21

Constitution

U.S. CONST.:

art. I, § 8, cl. 18 ("Necessary and Proper Clause") 16

art. I, § 9, cl. 4 ("Direct Tax Clause") 16

art. II, § 2, cl. 3 ("Recess Appointments Clause") 16

art. III, § 2 33

art. VI, cl. 2 ("Supremacy Clause") 15

amend. II ("Second Amendment") 17

amend. I ("Establishment Clause" or "Religion Clauses") 16, 20, 28

amend. I ("Speech Clause") 16

amend. XIV ("Fourteenth Amendment") ..... *passim*

OHIO CONST. art. XV, § 11 7

Jewish Religious Authorities

Deuteronomy 24:1 12

Genesis 2:24 12

Leviticus 18:22 12

MAIMONIDES,
MISHNE TORAH, FAMILY LAW 1:1-2 12

Rabbi Shlomo Yitzchaki ("*Rashi*")
Chullin 92 a-b 13

TALMUD BAVLI,
CHULLIN 92 a-b 13

Christian Religious Authorities

Mark 10:6-8 12

Matthew 19:4-9 12

CCC § 1601 14

CIC can. 1055 § 1 13

First Things, Evangelicals and Catholics Together,
The Two Shall Become One Flesh: Reclaiming Marriage, http://www.firstthings.com/article/2015/03/the-two-shall-become-one-flesh-reclaiming-marriage-2 12

Southern Baptist Convention,
The Baptist Faith and Message,
http://www.sbc.net/bfm2000/bfm2000.asp 14

St. Augustine,
Of the Good of Marriage 13

Islamic Religious Authorities

Qur'an:

4:3 14

4:20-25 14

Other Authorities

CHRISTOPHER ASH, MARRIAGE: SEX IN THE SERVICE OF G[-]D (2005) .. 14

Black's Law Dictionary, Marriage, 992 (8th ed. 2004) 4

Br. of *Amici Curiae* Mae Kuykendall, *et al.*, in Support of Neither Party 27

Br. of Robert George, *et al.*, *Amici Curiae* in *Hollingsworth v. Perry* and *United States v. Windsor*, Nos. 12-144, 12-307 5-6

Robert R. Cargill, *et al.*, Op-Ed., *Iowa View: 1 Man, 1 Woman isn't the Bible's Only Marriage View*, DES MOINES REGISTER, June 3, 2013 15

Clerk's Order, *Brown v. Buhman*, No. 14-4117 (10th Cir 2015) 29

Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) 34

Sherif Girgis, *et al.*, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245 (2010) 4, 8, 11, 26, 33

Shannon Holzer,
Natural Law, Natural Rights, and Same-Sex Civil Marriage: Do Same-Sex Couples Have a Natural Right to be Married?, 19 TEX. REV. L. & POL. 63 (2014) 23-24, 27

Faris Malik,
Queer Sexuality and Identity in the Qur'an and Hadith. http://www.well.com/user/aquarius/Qurannotes.htm 14

Merriam-Webster, Marriage,
http://www.merriam-webster.com/dictionary/marriage..... 4-5

Mission Islam,
Islam and Homosexuality,
http://www.missionislam.com/knowledge/homosexuality.htm 14

DANIEL OTTOSSON, ILGA,
STATE-SPONSORED HOMOPHOBIA (2009) 14

CRAIG A. WILLIAMS,
ROMAN HOMOSEXUALITY (2d ed. 2009) 10-11, 19-20

WikiIslam,
Islam and Homosexuality,
http://wikiislam.net/wiki/Islam_and_Homosexuality..... 14

Wikipedia:

Homosexuality in Ancient Rome,
http://en.wikipedia.org/wiki/Homosexuality_in_ancient_Rome..... 10

Marriage (Catholic Church), Church Fathers, http://en.wikipedia.org/wiki/Marriage_(Catholic_Church)#Church_Fathers 13

INTEREST OF THE *AMICUS*[1]

Amicus, the Committee for Justice ("CFJ" or "*Amicus*"), is a nonprofit, nonpartisan organization dedicated to advancing the rule of law. CFJ emphasizes the need for judges to engage in objective interpretation of the Constitution rather than creating new law based on their policy preferences.

Were this Court to use this case to impose a uniform definition of marriage on the States—something the Fourteenth Amendment does not require and the principles of federalism forbid—it would represent an extreme example of judicial activism. Moreover, were this Court to find a constitutional right to same-sex marriage while denying such a right to those seeking other forms of non-traditional but consensual marriage, the Court would be viewed as acting for purely political reasons, which would do substantial damage to both the rule of law and this Court's credibility. CFJ aims to prevent both of those consequences.

---

[1] The parties have consented to the filing of this brief, and such consents are on file with the Court. As required by Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *Amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Constitution neither defines marriage nor prescribes any robust theory with which to describe marriage. Yet, this appeal asks the Court to conduct a constitutional analysis of the Respondent States' definitions of marriage. Engaging that constitutional analysis without a working theory or definition of marriage is simply not possible. Accordingly, prior to engaging that constitutional analysis, marriage must *first* be defined with reference to a theory extrinsic to the Constitution.

Amicus offers two competing and mutually exclusive theories with which to define marriage—one referring to historical practice and the other to the mutual consent of the parties—and shows that those two theories are the only ones that are wholly complete, robust, universal, and logical.

Those two theories animate this entire appeal. The Petitioners argue that a marriage is the legal recognition of a committed union between consenting adults. Refusal to recognize that union, they contend, subjects them to discrimination and denies to them substantial rights. The Respondents argue that a marriage is and has always been a union between man and woman and that the Petitioners seek the legal equivalent of a null set.

There is one other significant point that divides the Parties. The Respondent States simply want the sovereign right to define marriage, relying on whatever theory their citizens have determined to be appropriate. The Petitioners, in contrast, ask this Court to mandate, pursuant to the Fourteenth

Amendment, that all States define marriage with reference to the mutual consent of adults. Doing so would pose considerable problems for existing state statutes and precedent of this Court, even beyond the context of same-sex marriage. Specifically, several hundred state statutes that prohibit polygamous and incestuous marriages will either be instantly invalidated or will be constitutionally suspect if this Court decides that the Fourteenth Amendment defines marriage only with reference to consent. And a decision nearly 150 years old, *Reynolds v. United States*, 98 U.S. (8 Otto.) 145 (1878), and its many progeny, will be immediately called into doubt.

In any event, this Court should decline to decide whether marriage ought to be defined with reference to consent or history. First, the Court is ill-equipped to make that decision, which depends on philosophy and politics, not law. It should rather defer to the democratically-elected legislatures of the States. Second, this Court has already held in *United States v. Windsor*, 133 S.Ct. 2675 (2013), that there is no federal definition of marriage. It should not now compel all states to abandon thousands of years of history and re-define marriage with reference only to consent.

ARGUMENT

The parties and the other *amici* spend much time debating the role of the Fourteenth Amendment in the definition of marriage. But they spend very little time considering and developing a coherent theory of marriage or what impact that theory might have on the constitutional analysis. *Amicus* respectfully submits that this is a mistake.

Before determining if any State's requirements for marriage satisfies the Fourteenth Amendment, it is necessary to answer the predicate question: What is marriage and how do we know? *See* Sherif Girgis, *et al.*, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 251 (2010) ("[B]efore we can conclude that some marriage policy violates [a] moral or constitutional principle, we have to determine what marriage actually is."). *Amicus's* objective is to shed some light on that predicate question and its impact on the constitutional analysis.

I. The Court must determine what constitutes "marriage" before considering whether a right to marry has been violated

Defining the word "marriage" is tricky. Behind the determination of a proper definition lies all of the social and political questions that animate this appeal. For example, Black's Law Dictionary defines marriage as "[t]he legal union of a couple as husband and wife."[2] That was indeed the unquestioned legal definition of marriage until recent years. But that legal definition begs the question: Why? Merriam-Webster, apparently in response to recent social changes, defines marriage more broadly:

> (1): the state of being united to a person of the *opposite sex* as husband or wife in a consensual and contractual relationship recognized by law (2): the state of being united to a person of

[2] Black's Law Dictionary, Marriage, 992 (8th ed. 2004).

> the *same sex* in a relationship like that of a traditional marriage[.][3]

But, of course, this too begs the same question: Why?

The best and most objective way to resolve this problem is to momentarily put aside the question of determining a *definition* and instead look for a broad neutral *theory* of marriage that can guide attempts to define marriage. Doing so should enable us to set aside the social and political questions that complicate this appeal. Moreover, proceeding without such a theory would render any definition of marriage completely malleable, making it impossible to determine if the Respondent States have adopted the wrong definition, as Petitioners implicitly claim. *See Holder v. Hall*, 512 U.S. 874, 881 (1994) (holding that, in the absence of an "objective and workable standard for choosing a reasonable benchmark," it is impossible to consider the propriety of certain state actions).

Fortunately, there are just two such theories of marriage, at least when the theories are stated as broadly as possible. And those theories, in turn, necessitate distinct definitions.

The first theory, which *Amicus* refers to as the "historical norm," defines marriage by looking to the manner in which it has always been defined. History does not necessarily offer normative answers.[4] But it

---

[3] Merriam-Webster, Marriage, http://www.merriam-webster.com/dictionary/marriage (emphasis added) (last accessed Mar. 10, 2015).

[4] The historical norm is considerably different from the "conjugal view" of marriage articulated by Robert George, *et al.*,

has the benefit of being tested by time and accepted by thousands of cultures and billions of people over the course of many thousands of years. When history yields a virtually unanimous answer to a question over a long period of time, its normative appeal is heightened. In this case, the history is both unanimous and quite long. As Judge Sutton put it in his decision for the Sixth Circuit, the tradition on how to define marriage "is measured in millennia, not centuries or decades." *Obergefell* Pet. App. 14a ("Pet. App.").

Amicus refers to the second broad theory of marriage as the "consent norm." It defines marriage solely with reference to the consent of willing partners. Using this norm, any adults who wish to marry may do so. Petitioners and their *amici* hint that they have adopted—and are advancing—this theory of marriage.

Before it is possible to intelligently consider the application of the Fourteenth Amendment in this appeal, it is necessary to first decide whether the historical norm, the consent norm, or, instead, no particular norm is mandated by the Fourteenth Amendment. Without first reaching that question, it

---

as *amici curiae* in *Hollingsworth v. Perry* and *United States v. Windsor*, Nos. 12-144, 12-307. The "conjugal view" is rooted in natural law and philosophy and advances a decidedly normative approach to marriage. As *Amicus* explains *infra*, it is just *one* justification for the historical norm, not a competitor with it.

seems impossible to ask, for example, whether Ohio's constitution, which provides:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.

OHIO CONST. art. XV, § 11, violates the Fourteenth Amendment. If we operate under the consent norm, the answer is fairly simple: If marriage is simply a union between consenting adults, and Ohio has decided that two consenting adults may not get married solely on the basis that they share the same sex, this is discrimination.[5]

Conversely, if we operate under the historical norm, the answer to the question above is evident. As *Amicus* will show *infra*, marriage has for "millennia, not centuries or decades" been "defined by relationships between men and women." Pet. App. 14a. Accordingly, Ohio's formal adoption and enforcement of that historical definition cannot be a denial of Petitioners' right to marry for the simple reason that, under the historical norm, the Petitioners are asking for something—the recognition of the union of two people of the same sex as a marriage—that, prior to our day, has never been. (This is not to say that the Petitioners have suffered no harm. Many of them have. *Amicus* addresses this in the next section.)

---

[5] Whether this discrimination is unconstitutional depends on the level of scrutiny applied and the governmental interests advanced. But, regardless of how that constitutional analysis is resolved, such discrimination is offensive to the operation of a just society that must remain neutral as between its subjects.

The historical norm provides a theory of how marriage should be defined. It is not an explanation of how the norm, or the history that underlies it, came to be. Rather, it uses the consensus of the past to inform how we ought to approach and define marriage today; *Amicus* does not suggest that history, no matter how unjust, ought to be codified *simply* because it is ancient.[6] The historical norm is informed by millennia of thought about what marriage should be, why law regulates marriage, and how law ought to deal with it. *Amicus* considers some of these topics *infra*. For now, the point is this: Under the historical norm, a man who wishes to *marry* another man in a state that does not license same-sex marriages is not being denied the right to marry. Rather, he is being told that he seeks something that is incompatible with marriage.[7] In this sense, this man is no different than a man who seeks to marry two women. *See generally Reynolds*, 98 U.S. 145 (upholding a statute banning bigamy).

Operating within this framework, asking one of the Respondent States to license or recognize a marriage between two men is much like asking them to hold a party to the terms of an oral "contract" that

---

[6] As it happens, the historical view of marriage has significant normative appeal. *See infra*.

[7] For this reason, the Petitioners' reliance on *Loving v. Virginia*, 388 U.S. 1 (1967), is completely misplaced. Girgis, *et al.*, *supra*, at 248-49 ("[T]he analogy fails: antimiscegenation was about whom to allow to marry, not what marriage was essentially about."). *Loving* involved a marriage that the State of Virginia *criminalized* on the ground that the various races should not be "mix[ed]." *See Loving*, 388 U.S. at 2. Virginia did not ever deny that the criminal defendants were married—if it had, it could not have maintained their conviction. *Id.* at 4-6.

is within the statute of frauds or to a written "contract" that lacked consideration. In either case, the agreement is not recognized by state law. Failing to enforce the agreement is not discrimination. It is the result of a conclusion by the State, perhaps in response to hundreds of years of history and broad consensus, that such agreements are not contracts. The party seeking enforcement of the agreement has not been denied a right. Instead, he is demanding that the State disregard the essence of the contractual relationship and the manner in which "contract" is defined.

Similarly, working under the historical norm, a man who seeks to *marry* his male lover and companion is asking the Respondent States to disregard the essence of marriage, as they have defined it. He certainly has the legal right to love this companion and live with him as married couples do, *Lawrence v. Texas*, 539 U.S. 558 (2003), and he might even have the right to legal recognition of that union in certain contexts, but he cannot *marry* his lover.

II. There are two competing complete, neutral, and robust theories of marriage

A. The "historical norm": The word marriage always described a union between man and woman

1. As this Court recently noted,

> [M]arriage between a man and a woman...had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.

Windsor, 133 S.Ct. at 2689 (2013); *see also Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 186 (1971) ("The institution of marriage as a union of man and woman...is as old as the book of Genesis."). Indeed, as far as *Amicus* is aware, no civilization in recorded history, until our day, has treated a committed relationship between two people of the same sex as the equivalent of a relationship between people of different sexes.

Even civilizations that accepted or even celebrated homosexual relations—ancient Rome, for example[8]—saw *marriages* between men as deviant and refused to give such marriages legal recognition. CRAIG A. WILLIAMS, ROMAN HOMOSEXUALITY 279-80 (2d ed. 2009). Homosexual unions may have taken place in Rome, but

> such marriages were, by traditional Roman standards, anomalous in view of the fundamental nature of *matrimonium*, a hierarchical institution that was aimed at creating legitimate offspring as well as a route for the transmission of property (*patrimonium*) and that required the participation of a woman as subordinate partner.
>
> In traditional Roman terms, *a marriage between two fully gendered "men" was inconceivable*; if two males were joined together, one of them had to be "the woman."

---

[8] *See, e.g.*, Wikipedia, Homosexuality in Ancient Rome, http://en.wikipedia.org/wiki/Homosexuality_in_ancient_Rome (last accessed Mar. 12, 2015).

Id. at 286 (paragraph break and emphasis added) (Latin words italicized in original); *contra Tanco* Pet. Br. 51 (claiming, erroneously, that non-recognition of same-sex marriage was invented circa 1970).

And even historical exceptions to the one-man-one-woman definition of marriage did not allow for same-sex marriage. Cultures that permitted polygamy nonetheless defined marriage as several heterosexual unions. Girgis, *et al.*, *supra*, at 247 n.3.

As the Sixth Circuit noted, "[t]he traditional definition of marriage goes back thousands of years and spans almost every society in history." Pet. App. 53a. It is particularly telling that not one of the Petitioners cite to a single historical example in which a society embraced as "marriage" a union of two people of the same sex. To the contrary: The Petitioners rebuked thousands of years of history, thought, debate, and reflection as reflecting nothing but animus. *Amicus* reviewed the numerous briefs filed by the Petitioners' *amici* and found no example in that voluminous briefing of any society anywhere embracing same-sex unions as marriages. Very likely, there is not one.

2. The major Western religions have taken a very clear stance on the definition of marriage. The Pentateuch, the foundation of those religions, does so at least twice. The second chapter of Genesis, upon discussing the creation of the first man and first woman, immediately declares that "a *man* should leave his father and mother and cling to his *wife* and

they shall become one flesh."[9] It later describes homosexual activity as an "abomination"[10] and expressly defines marriage as the union between man and woman.[11] Contrary to the dissent from the Sixth Circuit's decision, Jews (operating under this definition provided by the Pentateuch) have always attached civil legal significance to this heterosexual definition of marriage; marriage, under Jewish Law, was never and is not simply a "religious obligation," distinct from a designation of "civil status." *Contra* Pet. App. 94a (Daughtrey, *J.*, dissenting).[12]

---

[9] Genesis 2:24 (translation by attorney) (emphasis added).

The New Testament repeats virtually identical language at Mark 10:6-8, which is traditionally recited by Christians at wedding ceremonies. *See* First Things, Evangelicals and Catholics Together, *The Two Shall Become One Flesh: Reclaiming Marriage*, http://www.firstthings.com/article/2015/03/the-two-shall-become-one-flesh-reclaiming-marriage-2 (Mar. 2015); *see also* Matthew 19:4-9.

[10] Leviticus 18:22. The Hebrew word is *to'evah*, which might be better translated as "disgusting" or "abhorrent."

[11] Deuteronomy 24:1 ("When a man marries a woman..." (translation by attorney; some substitute "If" for "When," but the latter is truer to the meaning of the text)) (Maimonides derives from this phrase a Biblical commandment to marry. MAIMONIDES, MISHNE TORAH, FAMILY LAW 1:1-2.). Aside from defining marriage, the verse's specific references to gender seem superfluous; if this phrase were not intended as definitional, it would have served no apparent purpose as the remainder of the verse discusses divorce, not marriage.

[12] Marriage under Jewish Law forms the basis for numerous other doctrines, including those related to the following *civil* obligations or restrictions imposed by Jewish Law: financial support for children, divorce, conjugal obligations that a husband has to his wife, various religious opportunities and commandments that are contingent upon familial relationships

Throughout the ages, at least up until our day, the Jewish position is that the *civil* institution of marriage is possible only between a man and a woman and that it is simply not possible for homosexuals to marry.[13]

The Christians maintained this position. Among others, Augustine, writing in circa 400 C.E., was plainly in agreement.[14] As far as *Amicus* is aware, there was not any dissent on this issue among the Church's early leaders, despite the fact that they disagreed with each other about several other significant issues related to sex and marriage.[15] And the modern Catholic Church maintains in the Catholic Code of Canon Law that "[t]he matrimonial covenant" is the means "by which a man and a woman establish between themselves a partnership."[16] This position,

---

(especially regarding female relatives of a *kohen*), the acquisition of property, and evidentiary standards in civil proceedings.

[13] The Talmud records a statement made circa 300 C.E. in which non-Jewish civilization (*i.e.*, the masses, rather than individuals) is praised for not formally recognizing marriages between men for civil monetary purposes (referring to *ketubah*). TALMUD BAVLI, CHULLIN 92 a-b (translation by attorney). Rabbi Shlomo Yitzchaki ("*Rashi*"), explains in circa 1100 C.E. that although homosexual intercourse among non-Jews was not uncommon, the non-Jews did not "make light of this [Biblical prohibition]" to the extent of legally recognizing homosexual unions as marriages. *Rashi*, *ad loc.* (translation by attorney).

[14] *See generally*, St. Augustine, *Of the Good of Marriage*, *available at* http://www.newadvent.org/fathers/1309.htm (2009).

[15] *See*, *e.g.*, Wikipedia, Marriage (Catholic Church), Church Fathers, http://en.wikipedia.org/wiki/Marriage_(Catholic_Church)#Church_Fathers (last accessed Mar. 13, 2015).

[16] CIC can. 1055 § 1, *available at* http://www.vatican.va/archive/ENG1104/__P3V.HTM (last accessed Mar. 13, 2015).

limiting marriage to heterosexual unions, is quoted and affirmed verbatim in the Catechism of the Catholic Church.[17] Similarly, Protestant and Evangelical groups, at least until our day, have maintained this position. For example, the Southern Baptist Convention, in its summary statement of faith, declares that "[m]arriage is the uniting of one man and one woman in covenant commitment for a lifetime."[18] *See also generally* CHRISTOPHER ASH, MARRIAGE: SEX IN THE SERVICE OF G[-]D (2005).

Islam likewise maintained this position.[19] The Qur'an expressly describes marriage as the union between a man and one or more (up to four) women. Qur'an 4:3, 20-25. Modern Islamic teaching is generally unchanged.[20]

Not all of these sources subscribed to a monogamistic definition of marriage. But none of

---

[17] CCC § 1601, *available at* http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a7.htm (last accessed Mar. 13, 2015).

[18] Southern Baptist Convention, The Baptist Faith and Message, http://www.sbc.net/bfm2000/bfm2000.asp (last accessed Mar. 29, 2015).

[19] *See, e.g.*, Mission Islam, *Islam and Homosexuality*, http://www.missionislam.com/knowledge/homosexuality.htm (last accessed Mar. 29, 2015); WikiIslam, *Islam and Homosexuality*, http://wikiislam.net/wiki/Islam_and_Homosexuality (last accessed Mar. 29, 2015).

[20] DANIEL OTTOSSON, ILGA, STATE-SPONSORED HOMOPHOBIA 5, 12, 16, 21-23, 28, 32, 34, 37, 39 (2009), *available at* http://www.webcitation.org/6LLkhFR75; *see also* Faris Malik, *Queer Sexuality and Identity in the Qur'an and Hadith*, http://www.well.com/user/aquarius/Qurannotes.htm (last accessed Mar. 29, 2015).

them "would allow marriages between people of the same sex."[21]

3. This Court has long deferred to historical understanding as indicative or informative of legal rights. This March, it used writings by Hamilton, Madison, and Story to conclude that the Supremacy Clause does not create a right of action. *Armstrong v. Exceptional Child Center, Inc.*, 2015 WL 1419423 at *3 (Mar. 31, 2015). This was hardly an aberration. James Madison's name appears in 246 of this Court's decisions, 226 of which were published in 1950 or later. Thomas Jefferson likewise appears often—in 243 decisions, 183 of which are dated 1950 or later. And Joseph Story's *Commentaries on the Constitution of the United States* appears in 152 decisions, 110 of which are dated 1950 or later. Nearly all of those citations are positive and intended to lend support to a legal argument by demonstrating historical support.

The Court regularly uses the historical record to assign meaning to constitutional provisions. Chief Justice Marshall did so in no less a precedent than *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department...as a law of undoubted

---

[21] Robert R. Cargill, *et al.*, Op-Ed., *Iowa View: 1 Man, 1 Woman isn't the Bible's Only Marriage View*, DES MOINES REGISTER, June 3, 2013 (biblical scholars arguing that the texts could not be used to support monogamistic definition of marriage, but admitting that they do indicate a heterosexual definition of marriage).

> obligation.... The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability.... It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.

Id. at 401-02. And it did so last Term in interpreting two separate Clauses of the Constitution: 1) the Establishment Clause, *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811, 1818-20, 1823-24 (2014); *id.* at 1825 (op. of Kennedy, *J.*), and 2) the Recess Appointments Clause, *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550, 2559-60, 2562-64, 2570-71, 2577 (2014) (concluding that the Court's holding is "reinforced by centuries of history, which we are hesitant to disturb"). In the past ten years—aside from its holdings in *Armstrong*, *Town of Greece*, and *Noel Canning*—the Court has used history to help define, among other provisions, 1) the Religion Clauses, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S.Ct. 694, 702-04 (2012) (unanimous); 2) the Direct Tax Clause, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2598-99 (2012); 3) the Executive's removal power, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010); 4) the Necessary and Proper Clause, *United States v. Comstock*, 560 U.S. 126, 137-43 (2010); 5) the Speech Clause of the First Amendment, *Nevada*

Comm'n on Ethics v. Carrigan, 131 S.Ct. 2343, 2347-49 (2011); and 6) the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570, 592-619 (2008). And, of particular note, it used history to define the proper role of the States with regard to domestic relations in *Windsor*, 133 S.Ct. 2675. This consistent reference to historical practice affirms that "the longstanding 'practice of the government' can inform our determination of 'what the law is.'" *Noel Canning*, 134 S.Ct. at 2560 (internal citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and *McCulloch*, 17 U.S. at 401)).

Certainly, history is not dispositive. "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970). But, as this Court made clear in the very next sentence in *Walz*, "an unbroken practice of [a given legal position], openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Id.* That is certainly no less true with regard to the Fourteenth Amendment:

> The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it[.]

Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (Holmes, *J.*). History tells us a great deal about the

meaning of Constitutional text and how to apply it. And there is a strong presumption that the constitution is not contrary to a practice with a long history of "common consent." *Id.*

When the history predates the constitutional text not by "two hundred years," *id.*, but by over three *thousand* years, the presumption—that constitutional text that does not expressly displace an ancient historical understanding is deemed to be consistent with it—is vastly stronger. Here, several thousand years of recorded history make exceedingly clear that "marriage" describes a heterosexual union, not a homosexual one. Despite that background, the Petitioners argue that the Fourteenth Amendment, constitutional text drafted in the mid-nineteenth century that makes no mention of marriage and has long been understood to be consistent with historical practice, *e.g.*, *Ex parte State ex rel. Alabama Policy Inst.*, 2015 WL 892752 at *5-7 (Ala. Mar. 3, 2015) (*per curiam*); *Matter of Cooper*, 187 A.D.2d 128, 132-34, 592 N.Y.S.2d 797, 799-801 (N.Y. App. Div. 1993); *Singer v. Hara*, 11 Wash. App. 247, 260-64, 522 P.2d 1187, 1195-97 (1974); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); *Baker*, 291 Minn. at 311-13, 191 N.W.2d at 186; *see also Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (Md. 2007) (applying state constitutional law in comprehensive analysis), nevertheless voids that practice. They should be met with great skepticism.

Conversely, the wisdom of several thousand years should not be quickly dismissed. While it is true that our ancestors adopted some laws and practices worthy of little regard, the fact remains that most of the

norms (both legal and social) that govern our society come from our ancestors. Sure, in some instances we might have chosen different rules if we were starting from scratch today, but were that reason to discard the historical norms that govern our society, civil life would have no stability, no predictability, and much discord. Simply disregarding the collective wisdom received from our ancestors—as Petitioners urge this Court to do with regard to marriage—would be a fool's mistake. Indeed, such wisdom is the very foundation of the common law system.

4. Reliance on the historical norm does not rest on any particular normative argument. Rather, the historical norm posits that, in light of the exceptionally long historical practice regarding the definition of marriage, that historical definition should be presumed, regardless of how we might define it if we were creating marriage from scratch today. But the historical definition of marriage has considerable normative appeal as well. Assessing that normative appeal requires giving consideration to the discrete sources of this long history.

As the Sixth Circuit noted, government regulation of marriage—that is, committed heterosexual unions—was intended to facilitate the care of children. Pet. App. 33a ("It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children."). While the *Bourke* Petitioners derided this as a mere litigating position not to be taken "seriously," *Bourke* Pet. Br. 16, this was indeed the Roman position some *2,000 years ago*. "[*M*]*atrimonium*, [was] a hierarchical

institution...aimed at creating legitimate offspring as well as a route for the transmission of property[.]". WILLIAMS, *supra*, at 286. Even if there were no longer a need for such rules regulating the care of children, the fact remains that our history and our tradition created those rules—and the corresponding distinction between heterosexual and homosexual unions—with good reason. It is built into the very definition of "marriage." Disturbing that definition should give us pause.

Biology offers yet another normative basis for the historical record. Men and women are built in a manner that, in their union, enables them to engage in productive (or potentially productive) conjugal relations. Two people of the same sex cannot. That biological fact, whether orchestrated from on High or the result of millions of years of natural selection, tells us a great deal about the identities and differentiation of the sexes. It is therefore no mystery why our ancestors concluded that *only* sexual relationships responsive to those biological realities should be given the special legal status of marriage.

Finally, the historical record is also rooted in religious belief. While a State has no authority to legislate religion, U.S. CONST. amend. I, it is entitled—indeed, encouraged—to recognize and celebrate those roots:

> It is true that religion has been closely identified with our history and government. As we said in *Engel v. Vitale*..., "The history of man is inseparable from the history of religion. And * * * since the beginning of that history many people have devoutly believed that 'More things

> are wrought by prayer than this world dreams of.'" In *Zorach v. Clauson*..., we gave specific recognition to the proposition that "(w)e are a religious people whose institutions presuppose a Supreme Being." The fact that the Founding Fathers believed devotedly...is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.

Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 212-13 (1963). In fact, intentionally ignoring or deriding those roots would likely violate the First Amendment:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution *a requirement that the government show a callous indifference to religious groups*. That would be preferring those who believe in no religion over those who do believe.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (emphasis added). Compelling States to ignore the religious roots of their citizens, institutions, and history would be a constitutional violation as it would reflect a federal animus against religion. *Larson v. Valente*, 456 U.S. 228, 254-55 (1982); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-40 (1993).

States have a significant interest in respecting and protecting the moral and religious beliefs of their citizens, as long as they do not adopt policies solely on religious grounds or otherwise promote a particular religious belief. That interest weighs against a State labeling its citizens as "bigots" for refusing to adopt a new definition—a new orthodoxy—of marriage. Yet Petitioners urge essentially that. Avoiding such a display of animus against religion is a compelling governmental interest. *See Larson*, 456 U.S. at 253-55.

5. Notwithstanding the strong basis for choosing the historical norm, it is not without problems. *Amicus* has no doubt that the Petitioners and others who wish to have their homosexual relationships be dubbed "marriage" genuinely love each other, are committed to each other, and genuinely see themselves as being in a relationship like marriage. It is clear that at least some of them have suffered significant harm as a result of the application of the historical norm by some States. For example, the Sixth Circuit references the inability of some in homosexual relationships to "visit a partner or partner's child in the hospital." Pet. App. 16a. Surely, a homosexual partner in a committed relationship should not be denied that opportunity. Were it the historical norm that prevents hospital visitation, it would be cause for concern and for constitutional scrutiny.

But therein lies the rub. It is not the historical norm—the basis by which many States define *marriage*—that is the problem; the rules governing hospital visitation are the problem. A homosexual couple in a committed relationship that is denied

hospital visitation rights might have a valid claim against the State or hospital on the ground that they have been improperly denied hospital visitation. Their claim should not be that the State has improperly defined marriage. Such a claimant might be entitled to a state-recognized civil union or an exception to the requirement of a documented marriage for the purposes of hospital visitation. This deprivation does not, however, entitle him or her to compel the State to redefine as "marriage" something that has never been marriage.

B. The "consent norm": Marriage is the result of adults consenting to form a committed familial relationship

The *Tanco* Petitioners declare that "[t]he...freedom to marry includes the freedom to choose whom to marry." *Tanco* Pet. Br. 19. That statement briefly summarizes the positions of all of the Petitioners, who find offensive State laws that place restrictions on individual autonomy in marriage. Essentially, they argue that marriage is a choice made by individuals that results from love and reflects lasting commitments. *See Obergefell* Pet. Br. 3.

Their position, therefore, is that "marriage" is defined in the first instance with reference to individual consent. Though Petitioners also appear to incorporate "love" into their definition of marriage, it is difficult to believe that they wish to have their States, as a prerequisite to licensure or recognition of marriage, interview them and make findings as to the sincerity of their love. *See* Shannon Holzer, *Natural Law, Natural Rights, and Same-Sex Civil Marriage: Do Same-Sex Couples Have a Natural Right to be*

Married?, 19 TEX. REV. L. & POL. 63, 74 (2014) ("[T]he concept of love...is non-essential to marriage. Many people are married who rarely, if ever, feel passion for their spouse."). In any event, defining marriage with reference to a subjective and dynamic emotional state (many couples marry despite not experiencing love and many remain married even after they stop loving each other) would create a wholly unenforceable legal regime.

Once marriage is defined with reference to mutual consent, state statutes or constitutional provisions that limit licensure or recognition only to heterosexual couples deprive homosexual couples that want to be in a recognized marriage of rights guaranteed to other couples. This is discrimination.

There is much appeal to this argument. But it should be apparent that, notwithstanding the hundreds of pages of briefing presented by the Petitioners, this is not a purely *constitutional* argument. It is an argument on the theory of marriage, motivated in the first instance by a rejection of the historical norm (all of the Petitioners reject reliance on history, re-casting literally thousands of years of history as "discriminatory") and adoption of a very different theory, the consent norm.

The consent norm provides a robust theory of marriage in the sense that it has considerable theoretical appeal outside of the context of same-sex marriage and is not (at least, not apparently) simply a litigating position. It is also extraordinarily simple and elegant: Adults who wish to form a loving committed relationship may do so, and that relationship is called "marriage."

It is apparent, therefore, that the Petitioners and Respondents approach this appeal from two very different places. The Petitioners say that they have been deprived of the right to State recognition of their union, despite that it is not materially different from other unions recognized by their States as marriage. The States say that the Petitioners are asking the States to treat the Petitioners as married despite the fact that their union is incompatible with marriage. Those conflicting baseline assumptions animate this entire litigation.

C. The historical and consent norms comprise the Court's exclusive options

The choice facing a decision-maker in selecting a theory of marriage is binary. The decision-maker must select between the historical norm and the consent norm.

There is no third option available as any purported alternative is subsumed by either the historical norm or consent norm. An appeal to religion or natural law, for example, is simply an adoption of one of the normative sources that underlie the historical norm (both of those theories contribute significantly to the historical definition of marriage). Similarly, an appeal to the basic or essential rights of human beings—arguing that all human beings have an essential right to marry the person that he or she loves—is little more than a restatement of the consent norm. Both the historical norm and consent norm have variations and subsets, each with their own supporters and detractors. *Amicus* has articulated the options

available to the decision-maker in the broadest possible manner.[22]

III. The consent norm poses considerable legal and line-drawing problems

The universality and apparent neutrality of the consent norm make it particularly attractive. It facilitates state recognition of the unions of loving adult partners in a seemingly inclusive and non-discriminatory manner. But even the consent norm excludes some people from marrying—for example, mature teenagers (including after conceiving a child) and those adults who are not psychologically or physiologically capable of consent.

Such limitations are necessary in any definition of marriage; to be meaningful, a definition will have criteria that exclude. *See* Girgis, *et al.*, *supra*, at 251 ("Any legal system that distinguishes marriage from other, non-marital forms of association, romantic or not, will justly exclude some kinds of union from recognition."); *cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (noting the relationship between exclusion and expression). The alternative—no exclusions—is to say that any group of human beings (including infants) can marry, regardless of their

---

[22] *Amicus* has articulated these theories as broadly as possible to give them the broadest appeal and make them as universal and neutral as possible. In so doing, an equivalence is inadvertently suggested between, for example, religious sources of history and historical sources that define marriage with reference to procreation. Obviously, many will reject this equivalence on normative grounds, opting instead for whatever subset of the historical norm that they find persuasive. *Amicus* takes no position on how to weight these various sources.

ability to consent or even understand what they are doing.[23] Clearly, any reasonable definition of marriage will leave some people feeling left out.

At very least, the consent norm applies with equal force to any competent adults who consent to marry, no matter their number or prior relation. Under the consent norm, committed consensual unions that are incestuous or involve more than two people[24] cannot be distinguished in a principled manner from committed homosexual unions. While the Petitioners would apparently be satisfied by a definition of marriage that restricts the consent norm to unions of only two people, such a restriction is no more or less arbitrary than one that defines marriage with reference to gender, which Petitioners contend violates the Fourteenth Amendment.[25] The problem is that the laws of nearly every State prohibit both plural and incestuous marriages (often both criminally and civilly), *see* Appendix, such that this Court's adoption of the consent norm will likely subject many hundreds of state statutes and some of

---

[23] Even then, some people would complain that the definition of marriage is discriminatorily narrow. *See* Holzer, *supra*, at 75 ("France granted a woman a marriage license to 'marry' her dead boyfriend. In 2006 a woman 'married' a dolphin.... In Germany a man 'married' his cat, in China a man 'married' himself, and in South Korea a man 'married' his pillow.") (footnotes omitted).

[24] The word "polygamy," while not demanding this definition, is often used to refer to a relationship between one man and many women. To include all unions involving more than two people, this brief uses the generic term "plural marriage."

[25] *See* Br. of *Amici Curiae* Mae Kuykendall, *et al.*, in Support of Neither Party at 18-19 n.17.

this Court's own precedent to reconsideration and likely invalidation.

A. *Reynolds*, which upholds state bans of bigamy, is inconsistent with the consent norm

This Court's decision in *Reynolds* cannot be squared with the consent norm and will certainly be in tension with the decision in this appeal, if this Court rules for the Petitioners. *Reynolds* declared, relying on a long history of polygamy bans (noting in particular a statute passed circa 1600 C.E. that made polygamy a capital offense), that the First Amendment's guarantee of "free exercise" of religion, U.S. CONST. amend. I, was never intended to include a right to engage in bigamy. *Reynolds*, 98 U.S. at 164-66. It thus affirmed a criminal conviction for bigamy notwithstanding that the bigamy was practiced for religious reasons. *Id.* at 166-67; *see also* 169 (on rehearing) (clarifying that the sentence would be served with "hard labor").

Some of the reasoning in *Reynolds* is arguably inconsistent with some of the Court's more recent cases. *See Brown v. Buhman*, 947 F.Supp.2d 1170, 1181-89 (D. Utah 2013). But *Reynolds* remains good law and was cited favorably by this Court (albeit, for another point) just seven years ago. *Giles v. California*, 554 U.S. 353, 366-67 (2008); *see also Church of the Lukumi*, 508 U.S. at 535 (citing *Reynolds* in 1993 for the proposition that "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination").

Unless this Court is prepared to reconsider *Reynolds*, it should refrain from mandating adoption of the consent norm.

B. State statutes that prohibit and criminalize incestuous and plural marriages are inconsistent with the consent norm

If marriage is defined with reference to consent, then bans on incestuous and plural marriages are no less constitutionally suspect than bans on same-sex marriages. Without exception, the Petitioners' legal arguments, if successful here, will apply with the same force in a subsequent case brought by polygamists or others who engage in plural marriage.[26] If this Court now adopts the consent norm, distinguishing this case from that future plural marriage case will be a vexing, if not futile, challenge.

Incest is only one small step further from same-sex marriage than is plural marriage. After all, what governmental interest justifies discrimination against those in incestuous relationships? If the answer is simply that incestuous relationships are more likely to produce genetically disabled children, there are numerous problems with that answer. First, it

---

[26] That future case might be before this Court next Term. The *Sister Wives* case, *Brown v. Buhman*, a challenge to Utah's criminalization of polygamy, is currently pending before the Tenth Circuit, docketed as number 14-4117. The district court upheld Utah's ban on polygamous *marriage* while striking as unconstitutional its ban on multiple cohabitation. *Brown*, 947 F.Supp.2d 1170. Utah appealed that decision; its brief is due to the Tenth Circuit on May 15, 2015. Clerk's Order, *Brown v. Buhman*, No. 14-4117 (10th Cir. Mar. 25, 2015).

stigmatizes and demeans disabled children in the same way that, Petitioners claim, the traditional definition of marriage stigmatizes and "demean[s]" homosexuals and their children. *See Obergefell* Pet. Br. 4. Second, it makes no sense when applied to same-sex, infertile, and elderly couples. Third, the Petitioners argue that marriage has little or nothing to do with procreation. *See, e.g., Obergefell* Pet. Br. 56. If so, that the union might yield disabled progeny is irrelevant. And fourth, if the prevention of marriages that are likely to yield disabled progeny were indeed a legitimate governmental interest, it would seem that the government should require all people to undergo genetic testing before receiving a marriage license. To the best of *Amicus's* knowledge, no State has such a requirement.[27] This suggests that bans against incest are motivated *not* by a governmental interest in preventing genetic disease, but rather by interests rooted in history or moral disapproval—precisely the interests that the Petitioners claim are invalid. Nonetheless, this Court will have to rely on such interests if it is to distinguish in a future case incestuous and plural marriages from same-sex marriages.

---

[27] Many States did in the past, but premarital medical testing requirements were repealed decades ago.

C. Mandating that States license or recognize same-sex marriages, but not requiring them to license or recognize plural or incestuous marriages, is unprincipled and inconsistent with the Fourteenth Amendment

Given the lack of a principled distinction, under the consent norm, between same-sex marriage on the one hand and incestuous or plural marriages on the other, if this Court were to mandate that all States recognize the former but not the latter, it will appear to be bowing to the considerable political power of the homosexual community. Contrast that power with people in plural or incestuous relationships, who are marginalized both socially and politically.[28] The effect of such a holding would be to turn any constitutional right to marriage into little more than a privilege to be doled out according to political power and popularity. That would be an affront to the Fourteenth Amendment under any level of scrutiny. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (in identifying "suspect" and "quasi-suspect" classes, considering whether the group in question has sufficient political power to protect itself). Moreover, extending legal rights to some and denying them to others on a basis that is unprincipled and

---

[28] If marriage law were to differentiate between homosexuals and those in plural and incestuous relationships, privileging one group over the other, fairness and the Fourteenth Amendment dictate that the privilege should go to the group less-likely to be the beneficiary of special privileges obtained via the political process.

without logical foundation is an affront to the rule of law.

Logic and legal consistency dictate that this Court's elevation of the consent norm should be closely followed by the invalidation of many state statutes that treat those who are in or want to be in incestuous and plural relationships differently from those in homosexual relationships. The Appendix to this brief offers the Court some of those statutes, citing and summarizing a sample of implicated statutes from the States of the Sixth Circuit. Unless this Court is prepared to reconsider *Reynolds* and invalidate the statutes in the Appendix, along with literally one (possibly two or three) hundred other state statutes that 1) prohibit issuance of marriage licenses to incestuous and plural couples, 2) decline state recognition of incestuous and plural marriages performed in other jurisdictions, and 3) criminalize (usually as felonies) incestuous and polygamous acts, regardless of consent, it should not adopt the consent norm.

IV. This Court should decline to choose one theory of marriage over the other

A. Choosing between the historical and consent norms is necessarily political or philosophical and is not well-suited for resolution through litigation

There is no legal or constitutional doctrine that dictates the selection of either the historical norm or the consent norm. *See Windsor*, 133 S.Ct. at 2714 (Alito, *J.*, dissenting) ("Same-sex marriage presents a highly emotional and important question of public

policy—but not a difficult question of constitutional law."). Any preference for one over the other is inevitably driven by politics, culture, and philosophy.

Nonetheless, the Petitioners demand that this Court chose, in the course of analyzing and applying the Constitution, the consent norm over the historical norm. If this Court is forced to decide whether to define marriage with reference to mutual consent or else with reference to thousands of years of history, it will not be able to rely on any neutral or universal principles of law. Any decision, then, will be based on the naked preferences of the decision-makers. *Cf. Hall*, 512 U.S. at 881. But federal judges are not appointed to espouse or codify their political, cultural, or philosophical preferences; they are appointed to apply the law and decide cases. *See* U.S. CONST. art. III, § 2.

Choosing between the historical and consent norms via litigation is particularly tricky for a court because the choice implicates the interests of every American that is married or considering marriage. Defining marriage, aside from its obvious legal implications, has a greatly symbolic role. The Petitioners understand this and describe the refusal of the Sixth Circuit to redefine marriage as "stigmatizing." *Bourke* Pet. Br. 25-26. That argument, however, works equally well in the opposite direction. Redefining marriage with reference to the consent norm will, in the eyes of many, cheapen the institution of marriage, weaken its bonds, and undermine strongly held beliefs about family and conjugal relations. Girgis, *et al.*, *supra*, at 260-65. Thus any decision will be stigmatizing in some fashion to many

Americans. And the impact of any decision will be felt acutely and personally, well beyond the walls of this Court.

Lon Fuller strongly warned against the use of litigation to resolve "polycentric" matters, such as the one now facing the Court. His argument is intuitive: "The...fundamental point is that the forms of adjudication [(*e.g.*, litigation)] cannot encompass and take into account the complex repercussions that may result from any change [in the legal framework in which the adjudicator operates]." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978). He argued that any decision in a polycentric dispute does not simply resolve the dispute, it also changes the facts. Consider this analogy to a spider web:

> A pull on one strand will distribute tensions [in] a complicated [manner] throughout the web as a whole. Doubling the...pull will...not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap.

Id. at 395. The more complicated the web, and the more that external interests in an adjudication are "significant and predominant," the more it is appropriate for such a dispute to be resolved not by an adjudicator pulling on the web, but by a legislature or executive that can take the entirety of the web into account. *See id.* at 398, 404-05; *see also Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987).

Any structural change to the institution of marriage will have a broad impact on actors not currently before the Court and on the way that marriage, law, and society interact. A pervasive social institution like marriage, which has existed for thousands of years across all societies and impacts nearly every living person, forms a very complicated web indeed. The Court is simply ill suited to anticipate how altering that web might result in new changes, monitor them, and respond to them adequately.

Legislatures have neither of the problems discussed above. Legislators are elected for decidedly political reasons and are expected to make political or philosophical decisions. And legislatures, unlike courts, are equipped to engage in the fact-finding, supervision, and the constant reevaluation necessary to resolve polycentric disputes. Given that political processes in the States have proven capable of addressing the question of how to define marriage—with some States recognizing homosexual marriage because such redefinition is supported by their citizens and others retaining the historical definition of marriage preferred by their citizens—this Court should refrain from taking the decision away from the States and rendering a decision for them. It should rather defer to the democratically-elected state legislatures' determination of whether the historical norm or consent norm is better for their state. *See Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing an appeal on this question "for want of a substantial federal question").

B. *Windsor* held that federal law may not displace state definitions of marriage

In *Windsor*, this Court assessed the constitutionality of a federal law that imposed a uniform definition of marriage across the States, formally adopting the historical norm as the federal rule. The Court did not choose between the historical norm and the consent norm. Rather, it held that the federal government lacks authority to displace state definitions of marriage. *Windsor*, 133 S.Ct. at 2692. ("When the State used its historic and essential authority to define the marital relation..., its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.").

The Petitioners ask the Court to do precisely what it said it could not do in *Windsor*: use federal law (in this case, the Federal Constitution) to displace state definitions of marriage (in this case, state statutes and constitutional provisions). On this point, *Windsor* is controlling: The federal government does not and cannot define marriage for the States.

If this Court is to decide this appeal on the merits, it has two options. One option is to choose between the historical and consent norms. The Court's other option is to decide, as it did in *Windsor*, that there is no federal rule of marriage. This Court should choose the second option. It should not impose either the historical or consent norm on States that, in an exercise of their "essential authority to define the marital relation," have adopted the other norm. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

Curt Levey
THE COMMITTEE FOR JUSTICE
722 12th Street, NW
Fourth Floor
Washington, DC 20005
202-270-7748
CLevey@committeeforjustice.org

Meir Katz
Counsel of Record
THE BERKMAN LAW OFFICE
111 Livingston Street
Suite 1928
Brooklyn, NY 11201
718-855-3627
MKatz@berkmanlaw.com

Counsel for Amicus Curiae

April 2, 2015

APPENDIX

A Partial List of Statutes of States in the Sixth Circuit that Prohibit or Criminalize Plural and Incestuous Marriages

Statute	Pertinent Quote or Summary
SIXTH CIRCUIT STATUTES DEFINING "MARRIAGE" AS OTHER THAN PLURAL MARRIAGES	
KY. REV. STAT. ANN. § 402.020	prohibiting and voiding any marriage 1) "[w]here there is a husband or wife living" who "has not been divorced" and 2) "[b]etween more than two (2) persons"
MICH. COMP. LAWS § 551.5	prohibiting any marriage where one of the parties has a living spouse
MICH. COMP. LAWS § 552.1	rendering "absolutely void" a marriage otherwise "prohibited by law...because either party had a wife or husband living at the time of solemnization"
OHIO REV. CODE ANN § 3101.01(A)	limiting those "who may marry" to those "not having a husband or wife living"
TENN. CODE ANN. § 36-3-102	prohibiting the contract of a marriage "before the dissolution of the first"

Statute	Pertinent Quote or Summary
SIXTH CIRCUIT STATUTES CRIMINALIZING PLURAL MARRIAGE AND COHABITATION	
KY. REV. STAT. ANN. § 530.010	prohibiting, and classifying as a felony, a married person purporting to marry another person or cohabiting with any other person
MICH. COMP. LAWS § 750.439	prohibiting, and classifying as a felony, certain persons with a "former husband or wife living" marrying or cohabiting with another person
MICH. COMP. LAWS § 750.440	prohibiting, and classifying as a felony, a person knowingly marrying another who is married
MICH. COMP. LAWS § 750.441	prohibiting, and classifying as a felony, the solicitation of a "polygamous life" and the persuasion or instruction of another person "by private or public discourse" to "adopt a polygamous life"
OHIO REV. CODE ANN § 2919.01	prohibiting, and classifying as a misdemeanor, a married person marrying or cohabiting with any other person
TENN. CODE ANN. § 39-15-301	prohibiting, and classifying as a misdemeanor, 1) any married person "purport[ing]" to marry any other person and 2) any person "purport[ing]" to marry a married person

Statute	Pertinent Quote or Summary
SIXTH CIRCUIT STATUTES DEFINING "MARRIAGE" AS OTHER THAN INCESTUOUS MARRIAGES	
KY. REV. STAT. ANN. § 402.010	prohibiting and voiding marriages "between persons who are nearer of kin to each other by consanguinity, whether of the whole or half-blood, than second cousins"
MICH. COMP. LAWS § 551.3	prohibiting a man from marrying "his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree"
MICH. COMP. LAWS § 551.4	prohibiting a woman from marrying "her father, brother, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or cousin of the first degree"
MICH. COMP. LAWS § 552.1	rendering "absolutely void" a marriage otherwise "prohibited by law because of consanguinity or affinity between the parties"

Statute	Pertinent Quote or Summary
OHIO REV. CODE ANN § 3101.01(A)	limiting those "who may marry" to those "not nearer of kin than second cousins"
TENN. CODE ANN. § 36-3-101	prohibiting marriage with a 1) "lineal ancestor or descendant," 2) "lineal ancestor or descendant of either parent," 3) "child of a grandparent," 4) "lineal descendant[] of [a] husband or wife," or 5) "husband or wife of a parent or lineal descendant"

Statute	Pertinent Quote or Summary
SIXTH CIRCUIT STATUTES CRIMINALIZING INCEST	
KY. REV. STAT. ANN. § 530.020	prohibiting, and classifying as a felony, "sexual intercourse or deviate sexual intercourse" with "an ancestor, descendant, uncle, aunt, brother, or sister"
MICH. COMP. LAWS § 750.520b	prohibiting, and classifying as a felony, sexual conduct between people "of the same household" and people "related...by blood or affinity"
OHIO REV. CODE ANN § 2907.03	prohibiting, classifying as a felony, and defining as "sexual battery," any "sexual conduct" with a natural parent, adoptive parent or stepparent
TENN. CODE ANN. § 39-15-302	Prohibiting, and classifying as a felony, "sexual penetration" with a "natural parent, child, grandparent, grandchild, uncle, aunt, nephew, niece, stepparent, stepchild, adoptive parent, adoptive child" and with a brother or sister, including by adoption